FILED
Court of Appeals
Division II
State of Washington
4/29/2019 10:08 AM

52751-1-II
(NO. 17-2-00450-3)

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

POTTS FAMILY MOTORS INC.,

Appellant,

v.

CITY OF LONGVIEW,

Respondent.

BRIEF OF RESPONDENT

John E. Justice, WSBA No. 23042
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508-1880
(360) 754-3480
Attorneys for Respondent

TABLE OF CONTENTS

I. IDENTITY OF RESPONDENT 1

II. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR 1

III. COUNTER-STATEMENT OF THE CASE 1

A. Factual Background 1

B. Procedural Background 6

IV. SUMMARY OF ARGUMENT 8

V. ARGUMENT 9

A. Standard of Review 9

B. PFM was not entitled to notice of the seizure under RCW 69.50.505 because it had no "known right or interest" in the property seized 11

C. Even assuming PFM was entitled to notice, it was provide through its apparent managing agent, Sidney Potts 13

D. PFM cannot establish a claim for replevin or conversion because it provided no evidence to the trial court that it owned any of the seized property 17

E. PFM did not establish a claim for tortious interference with a business expectancy 19

F. PFM's claim for negligence is precluded by the public duty doctrine 20

G. The City is Immune for damages claims under RCW 69.50.506(c) **22**

VI. CONCLUSION **27**

TABLE OF AUTHORITIES

Washington State Cases

American Commerce Ins. Co. v. Ensley, 153 Wn. App. 31, 42, 220 P.3d 215 (2009) 20, 21

Baldwin v. Silver, 165 Wn. App. 463, 472, 269 P.3d 284 (2011) ...19

Bickford v. City of Seattle, 104 Wn. App. 809, 17 P.3d 1240 (2001) 26

Cedar River Water and Sewer Dist. v. King County, 178 Wn.2d 763, 779, 315 P.3d 1065 (2013) 13

City of Longview Police Department v. Potts, No. 48410–2-II, slip op. at 1 (Wash. Ct. App. December 27, 2017) 2

Curtis Studio of Seattle v. Lennes, 121 Wash. 32, 208 P. 79 (1922) 17

Dewey v. Tacoma School Dist. No. 10, 95 Wn. App. 18, 26, 974 P.2d 847 (1999) 25

Frost v. City of Walla Walla, 106 Wn. 2d 669, 724 P.2d 1017 (1986) 1, 6, 22, 23

Hudesman v. Foley, 73 Wn.2d 880, 886, 441 P.2d 532 (1968) ..9, 10

Island Air, Inc. v. LaBar, 18 Wash. App. 129, 136, 566 P.2d 972 (1977) 10

Johanson v. United Truck Lines, 62 Wn.2d 437, 440 (1963) 14

Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002) 9

LaMon v. Butler, 112 Wn.2d 193, 200–01, 770 P.2d 1027(1989) 8

Leingang v. Pierce County Med. Bureau, Inc., 131 Wash.2d 133, 157, 930 P.2d 288 (1997) 19

Lewis v. City of Mercer Island, 63 Wn. App. 29, 31, 817 P.2d 408 (1991) 23, 24

Mahoney v. Tingley, 85 Wash.2d 95, 100–01, 529 P.2d 1068 (1975) 26

McGough v. Edmonds, 1 Wash. App. 164, 168, 460 P.2d 302 (1969). 10

Munich v. Skagit Emergency Communication Center, 175 Wn.2d 871, 879, 288 P.3d 328 (2012) 21

Osborn v. Mason County, 157 Wn.2d 18, 23, 134 P.3d 197 (2006) . 21

Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wash.2d 342, 351, 144 P.3d 276 (2006) 19

Rainer Nat. Bank v. Lewis, 30 Wn. App. 419, 422, 635 P.2d 153 (1981) 24, 25

Reiner v. Pittsburg Des Moines Corp., 35 Wn. App. 331, 332-33, 666 P.2d 396 (1983) 14

Repin v. State, 198 Wn. App. 243, 270, 392 P.3d 1174 (2017) 17

Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986) 12

Sheikh v. Choe, 156 Wn.2d 441, 448, 128 P.3d 574 (2006) 21

State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) 11

State v. Potts, No. 45724–5–II, slip op. at 47, 51 3

State v. Potts, 194 Wn. App. 1049 (2016), *unpublished* 7

State v. Watkins, 136 Wn. 2d 240, 247, 148 P.3d 1112 (2006) 23

Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988) 21

Vacova Co. v. Farrell, 62 Wn.App. 386, 395, 814 P.2d 255 (1991). 12

Washington State Bank v. Medalia Healthcare LLC, 96 Wash.App 547, 554, 984 P.2d 1041 (1999) 17, 18

Weber v. Associated Surgeons, P.S., 166 Wash. 2d 161, 206 P.3d 671 (2009) 14

Wojcik v. Chrysler Corp., 50 Wash. App. 849, 854, 751 P.2d 854 (1988) 10

Young v. Key Pharmaceuticals, 112 Wn. 2d 216, 225-27, 770 ..... 10, 11, 12

Federal Cases

Celotex Corp. v. Catrett, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) 12

Washington State Statutes

RCW 4.28.080(9) 14

RCW 4.28.080(10) 14

RCW 7.64.020(2) 17

RCW 69.50 23

RCW 69.50.505 ..... 11, 21

RCW 69.50.505(3) 11, 13, 16, 22, 24

former RCW 69.50.505(a)(4) 3

RCW 69.50.506(c) 1, 8, 9, 22, 23, 24

Court Rules

CR 56(c) 10

CR 56 (e) 12

RAP 2.5(a) 23

RAP 10.3(a)(5) 18

I. IDENTITY OF RESPONDENT

The City of Longview, Washington, is the Respondent.

II. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

A. Should summary judgment for the City of Longview be affirmed for any damages claims against the City under RCW 69.50.506(c) and *Frost v. City of Walla Walla*, 106 Wn. 2d 669, 724 P.2d 1017 (1986)?

B. Was the defense City under RCW 69.50.506(c) tried by the implied consent of the parties when it was argued by both sides in writing and orally to the trial court without objection by plaintiff?

C Did Appellant create a genuine issue of material fact regarding the claim for replevin when it produced no evidence that it owned any of the seized property?

D. Should summary judgment be affirmed on the other grounds adopted by the trial court, which are not challenged in this appeal?

III. COUNTER-STATEMENT OF THE CASE

A. Factual Background.

Beginning on July 18, 2012, City of Longview Street Crimes

Unit made a number of controlled drug buys from Sidney Potts, the president of Potts Family Motors, Inc. ("PFM") The City seized "tools, vehicles, cash and bank accounts" during the execution of search warrants at three properties connected to Potts. *See, City of Longview Police Department v. Potts,* No. 48410–2-II, slip op. at 1 (Wash. Ct. App. December 27, 2017). Appendix 1.

Sydney Potts submitted a notice to the City claiming ownership of all the property at issue in this case, and requested a hearing. CP 80-83. The following procedural history regarding Potts's conviction and challenges to the seizure of the property is taken from pp. 1-3 of the above referenced Court of Appeals Opinion:

> Potts was arrested and charged with one count of leading organized crime (count I), three counts of violating the Uniform Controlled Substances Act (UCSA) with delivery within 1,000 feet of a school bus route stop (count II, III, V), one count of violating the UCSA with possession within 1,000 feet of a school bus route stop (count VI), one count of violating the UCSA with delivery (count IV), and one count of money laundering (count VII). The State also filed aggravating factors, alleging that the current offense was a major violation of the UCSA for criminal profiteering. Subsequently, count VII was dismissed and the sentencing enhancements on counts V and VI were also dismissed.
>
> While charges were pending, Potts moved for the return of his property. The trial court denied

Potts's motion.

> In November 2013, Potts was convicted of all the remaining counts and aggravators. Potts appealed his convictions. Potts also challenged in a statement of additional grounds the trial court's denial of his motion for the return of property.
>
> On July 6, 2016, we affirmed his convictions, but held that the search warrant only authorized a search for the property connected with Potts Family Motors. *State v. Potts*, No. 45724–5–II, slip op. at 47. We also held that "because Potts will not be retried and because we conclude above that the search warrant for Potts's home [2839 Louisiana Street] was invalid, we conclude the property seized from Potts's home should be returned to its rightful owner(s). *Potts*, No. 45724-5-II, slip op. at 51.
>
> On December 19, 2013, prior to this court's decision in Potts's direct appeal, a civil forfeiture hearing was held regarding property the City had seized from Potts. The hearing officer concluded that the property was obtained in the commission of a felony relating to the sale or delivery of illegal controlled substances, and was subject to forfeiture under former RCW 69.50.505(a)(4). On January 29, 2014, the hearing officer entered findings of fact and conclusions of law, and ordered the property forfeited to the City.

Separately from the above referenced appeal, PFM (with Sidney Potts acting as the president and sole corporate officer) instituted the present lawsuit. CP 10-14. The seized property at issue in this lawsuit is the same property at issue in the above

referenced appeals. CP 105. The *only* basis for PFM's claims in this case is the allegation that the "notice of said forfeiture action by Defendant was not provided to Plaintiff [PFM] owner herein." CP 11.

Sidney Potts is the current president of PFM and has been since May, 2015. CP 109-10.. Prior to becoming the president of the corporation, Mr. Potts testified to the following involvement in the corporation:

1. He donated many of the cars and cash to start the corporation. CP 97.

2. He attended the meetings with the corporation's attorney to establish a corporation. *Id.*

3. He was involved in selecting the location of the business. CP 101-02.

4. His name was on the company checking account after the date of incorporation and he signed a check for business expenses after the date of incorporation. CP 98-100 and 116.

5. He had an "interest" in Potts Family Motors, Inc. when the seizures occurred. CP 108-09.

7. He had an ATM card for the corporation to pay bills for

the corporation. CP 111.

Sidney Potts testified as follows:

Q. In 2012, was anyone other than you and Thomas Potts involved, in any way, in the operation of Potts Family Motors, Incorporated?

A. Michael Long.

Q. He's the attorney for the corporation?

A. Yes.

Q. Anyone else?

A. Was Cara Larson involved right at the beginning 2012?

A. I don't know. She might have been before Thomas came on board. I don't know what the dates are on that.

Q. Anyone else to your knowledge?

A. No.

Id.

Thomas Potts, the alleged prior president, never did any work on the lot. CP 103.

PFM never produced any evidence that it owned or claimed to own any of the seized property. CP 106. Sidney Potts has,

however, consistently claimed ownership of the seized property after it was seized. *Id.* PFM submitted a letter to the City, allegedly signed by Thomas Potts, that demanded the return of the property due to alleged lack of notice to the corporation, but did *not* actually claim ownership of the property. CP 118. Sidney Potts appealed the Order following the hearing he requested. CP 107. PFM did not appeal the Order. *Id.*

B. Procedural Background.

The City of Longview moved for summary judgment on all of plaintiff's causes of action. CP 67-76. The Court granted the City's motion and adopted "the reasoning set forth in the Defendant's Motion for Summary Judgment and Memorandum in Support" as to the claims of "tortious interference with business expectancy, conversion, and willful misconduct and negligence" . . . "as well as the reasoning in *Frost v. City of Walla Walla*, 106 Wn.2d 669, 724 P.2d 1017 (1986)." CP 218.

The Court held as to the claim for replevin that "plaintiff conceded at the Summary Judgment hearing that [PFM] received notice of forfeiture of the currency in which they had an interest, and were not entitled to receive notice of forfeiture of the currency in

which they did not have an interest." CP 219. That eliminated all claims related to the seized currency and PFM does not challenge that ruling on appeal. *Id.*

The Court noted that, as to the tools, the Court of Appeals had already ordered them returned to Sidney Potts, *citing*, *State v. Potts*, 194 Wn. App. 1049 (2016), *unpublished.* It further noted that Mr. Potts claimed ownership of these tools, whereas PFM presented no evidence of ownership and was thus not entitled to notice of their seizure.

Finally, regarding the seized vehicles, the Court ordered the City to provide additional information regarding the titles to each contested vehicle. The Court held that the City was entitled to summary judgment for vehicles titled to either Sidney Potts or to no one specifically because Sidney Potts, not PFM, had claimed ownership of those vehicles. CP 220. The Court denied summary judgment as to any seized vehicles titled to a third party, if any. *Id.* The City provided the additional information ordered by the Court, which showed none of the seized vehicles were titled to a third party. CP 221-316. The Court entered an Order granting summary judgment as to all claims. CP 317-319. PFM filed this appeal. CP

320.

IV. SUMMARY OF ARGUMENT

The trial court's grant of summary judgment on all damage claims was not limited to the defense of statutory immunity under RCW 69.50.506(c). CP 318. Appellant does not challenge any of those other bases.1

PFM does not challenge the trial court's ruling that it received notice of the seizure of the currency in which it had an interest. It is also undisputed that Sidney Potts received notice of the seizure of all the property that was as issue in this case and filed a notice indicating he, *not PFM*, was the owner.

Even assuming PFM was entitled to a notice of seizure for the tools and vehicles, Sidney Potts qualified as a managing agent for PFM and received notice of the seizure and made a claim of ownership in the property.

PFM failed to establish claims for replevin or conversion because there is no evidence that it owned any the property seized.

---

1 This Court can affirm an order granting summary judgment on any basis supported by the record. *LaMon v. Butler*, 112 Wn.2d.193, 200–01, 770 P.2d 1027(1989).

It also failed to submit any evidence on the five elements of its tortious interference claim. The public duty doctrine precluded PFM's negligence claim.

Finally, the City is entitled to immunity for any damages claims under RCW 69.50.506(c). PFM did not argue waiver of this defense to the trial court and cannot raise this argument for the first time on appeal. The City asserted statutory immunity in its summary judgment motion and it was tried with PFM's implied consent. PFM's objection to the immunity defense being asserted on summary judgment was therefore waived.

The trial court's summary judgment should be affirmed.

V. ARGUMENT

A. Standard of Review.

"The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

The purpose of summary judgment is to avoid a useless trial. *Hudesman v. Foley*, 73 Wn.2d 880, 886, 441 P.2d 532 (1968). Summary judgment should be granted if it appears from the record

that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Hudesman*, 73 Wn.2d at 886.

The party moving for summary judgment has the burden of establishing the absence of any issue of material fact. *Wojcik v. Chrysler Corp.*, 50 Wash. App. 849, 854, 751 P.2d 854 (1988). However, once the moving party has presented competent summary judgment proof, the non-moving party may not rest on mere allegations in its pleadings, but must respond by affidavit or other proper method setting forth specific facts showing there is a genuine issue for trial. *McGough v. Edmonds*, 1 Wash. App. 164, 168, 460 P.2d 302 (1969). Broad generalizations and vague conclusions set forth in an affidavit in opposition to a motion for summary judgment are insufficient to successfully resist the motion. *Island Air, Inc. v. LaBar*, 18 Wash. App. 129, 136, 566 P.2d 972 (1977).

Summary judgment does not alter the applicable burden of proof; a moving party need not disprove an essential element of the nonmoving party's case, and may merely point out for the court the absence of any essential element. *Young v. Key Pharmaceuticals*,

112 Wn. 2d 216, 225-27, 770 P.2d 182 (1989).

B. PFM was not entitled to notice of the seizure under RCW 69.50.505 because it had no "known right or interest" in the property seized.

RCW 69.50.505(3) provides, in pertinent part:

> In the event of seizure pursuant to subsection (2) of this section, proceedings for forfeiture shall be deemed commenced by the seizure. The law enforcement agency under whose authority the seizure was made *shall cause notice to be served within fifteen days following the seizure on the owner of the property seized and the person in charge thereof and any person having any known right or interest therein,* including any community property interest, of the seizure and intended forfeiture of the seized property. (Emphasis added)

First, the trial court found that plaintiff conceded it received notice of the seizure of all currency to which it claims entitled to receive notice. CP 219. Plaintiff's appeal does not challenge this determination and it is a verity on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). That leaves only the tools and vehicles.

Sidney Potts filed a notice indicating he owned all of the tools and vehicles at issue in this case. CP 80-83. His notice did not indicate that PFM had any interest or that he was claiming an

interest in his "individual capacity only."

When the defendant moves for summary judgment and alleges an absence of material facts in support of the plaintiff's case, as it did below, then the burden shifts to the plaintiff to make a prima facie case concerning the essential elements of its claim. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In so doing, the plaintiff may not rely on conclusory statements, mere allegations, or argumentative assertions. CR 56(e); *Vacova Co. v. Farrell*, 62 Wn.App. 386, 395, 814 P.2d 255 (1991). Instead, the plaintiff must put forth evidence showing a triable issue exists. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). If the plaintiff fails to meet this burden on an element for which the plaintiff bears the burden of proof at trial, then summary judgment is warranted "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In response to the City's motion for summary judgment, PFM failed to come forward with any evidence that it owned, or had an interest in, any of the seized property. PFM bore the burden of

proof on its claims. *Cedar River Water and Sewer Dist. v. King County*, 178 Wn.2d 763, 779, 315 P.3d 1065 (2013) ("Generally, plaintiffs bear the burden of proof on all elements of their claims.") Thus, there was a complete failure of proof concerning this element of PFM's case. PFM's appeal does not address this argument.

C. Even assuming PFM was entitled to notice, it was provide through its apparent managing agent, Sidney Potts.

Regarding non-"real" property forfeiture (including the cars tools seized in this case), the forfeiture statute provides that notice "*may* be served by *any method authorized by law or court rule* including but not limited to service by certified mail with return receipt requested." RCW 69.50.505(3) (emphasis added). The statute does not require one method of service of notice, i.e. on a corporation's "registered agent" as long as it is by a method "authorized by law."

Service on a domestic corporation can be made by delivering a copy of the notice to "the president or other head of the company or corporation, the registered agent, *secretary, cashier or managing agent* thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered

agent, secretary, cashier or managing agent." RCW 4.28.080(9). A "managing agent" is defined by case law as someone who has "some substantial part in the management of" the corporations affairs generally. *Johanson v. United Truck Lines*, 62 Wn.2d 437, 440 (1963). *See, e.g., Weber v. Associated Surgeons, P.S.*, 166 Wash. 2d 161, 206 P.3d 671 (2009) (service on manager of medical clinic, a corporation, was sufficient).

The doctrine of substantial compliance has also been held to apply to service on a corporation provided "(1) the purpose of the statute is not defeated and (2) the opposing party is not prejudiced." *Reiner v. Pittsburg Des Moines Corp.*, 35 Wn. App. 331, 332-33, 666 P.2d 396 (1983) (referencing RCW 4.28.080(10), service on a foreign corporation). The purpose of "serving notice is to advise a party his person or property is in jeopardy." *Id.* at 333. Prejudice refers to a party being "in the same position it would have been" had service been made using a different method. *Id.*

PFM failed to explain below how it was prejudiced by not receiving two notices that would have gone to the same person, i.e. Sidney Potts. PFM had notice of the seizure and never submitted any claim or evidence of ownership to the hearing officer. CP 118.

Nor did the corporation appeal the forfeiture order, while Sidney Potts did. CP 107.

It is undisputed that Sidney Potts received notice of the seizure of the tools and vehicles and made a claim of ownership in the property. Mr. Potts substantial involvement in, and admitted interest in, PFM included at least the following:

1. He donated a many of the cars and also cash to start the corporation. CP 97.

2. He attended the meetings with the corporation's attorney to establish a corporation. *Id.*

3. He was involved in selecting the location of the business. CP 101-02.

4. His name was on the company checking account after the date of incorporation and he signed at least one check for business expenses after the date of incorporation. CP 98-100 and 116.

5. He had an "interest" in Potts Family Motors, Inc. when the seizures occurred. CP 108-09.

6. He had an ATM card for the corporation to pay bills for the corporation. CP 111.

Sidney Potts was the only person involved in any way with running the corporation. CP 111-112. Thomas Potts, the supposed president of PFM, in fact, never did any work on the lot. CP 103. He was a figure head for the corporation because he had a clean police record, as opposed to Sidney Potts. CP 215. Mr. Potts clearly had "some substantial part in the management of" the corporations and thus qualifies as a "managing agent" for Potts Family Motors, Inc.. Service on Mr. Potts, as a managing agent, is a method authorized by law to affect service on a corporation in Washington. Thus, to the extent notice to Potts Family Motors, Inc. was necessary under RCW 69.50.505(3), it was provided.

PFM argued below that the City served notice on the corporation separately with regard to the Company checking account, which Sidney Potts was also on. A review of that notice, however, shows that it was served on Sidney Potts, who signed for it. CP 217. Sidney Potts never claimed he was unauthorized to receive notice on behalf of PFM.

Clearly, given his ubiquitous role in operating PFM virtually alone, Sidney Potts qualified as a "managing agent" when he received notice of the seizure from the City. Service on a managing agent is

a method authorized by law to affect service on a corporation in Washington.

Thus, to the extent notice to PFM was necessary under RCW 69.50.505(3), it was given. PFM does not address this argument on appeal.

D. PFM cannot establish a claim for replevin or conversion because it provided no evidence to the trial court that it owned any of the seized property.

To overcome summary judgment on the replevin claim, PFM was required to present evidence that it had an ownership interest in the seized property. RCW 7.64.020(2). The "burden is on plaintiff to prove title and right to possession, and recovery depends upon the strength of plaintiff's title and right of possession." *Curtis Studio of Seattle v. Lennes*, 121 Wash. 32, 208 P. 79 (1922).

A claim for conversion also required PFM to provide proof of ownership of the seized property. Conversion "is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." *Repin v. State*, 198 Wn. App. 243, 270, 392 P.3d 1174 (2017), *citing, Washington State Bank v. Medalia Healthcare LLC*, 96 Wash.App.

547, 554, 984 P.2d 1041 (1999).

PFM did not present evidence that it owned any of the seized property. CP 106. The trial court noted that Sidney Potts notified the City that he owned the tools and the Court of Appeals has already ordered them returned to Sydney Potts. The trial court ruled that "absent evidence that [PFM] owns any of these tools" it was not entitled to notice. PFM's appeal fails to address this issue. Regarding the vehicles, the trial court took additional evidence on the ownership of each vehicle. CP 221-316. That evidence demonstrated that PFM was not on the title of *any* of the seized vehicles. *Id.*

Thus, PFM failed to create a genuine issue of fact on its claim for replevin or conversion in the trial court because it did not present any evidence of ownership in the seized property.

On appeal, PFM makes the same conclusory statements made in the trial court, i.e. that there were genuine issues of fact regarding ownership of the vehicles. However, it fails to cite *any* evidence in the record supporting that conclusion. That is insufficient to challenge the summary judgment in the trial court and on appeal. See RAP 10.3(a)(5) (party must include reference to the record for

each factual statement in brief). *See, also, Baldwin v. Silver*, 165 Wn. App. 463, 472, 269 P.3d 284 (2011) ("A nonmoving party cannot defeat a motion for summary judgment with conclusory statements of fact.")

Because PFM did not own *any* of the property seized by the City, summary judgment on the replevin and conversion claims should be affirmed.

E. PFM did not establish a claim for tortious interference with a business expectancy.

A party claiming tortious interference with a contractual relationship or business expectancy must prove five elements: "(1) the existence of a valid contractual relationship or business expectancy, (2) that defendants had knowledge of that relationship, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, (4) that defendants interfered for an improper purpose or used improper means, and (5) resultant damage." *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wash.2d 342, 351, 144 P.3d 276 (2006) *(quoting Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wash.2d 133, 157, 930 P.2d 288 (1997)).

In response to the summary judgment motion on this claim, PFM presented no evidence of ownership of the property at issue, any existing contractual relationship to sell a car or an expectancy to do so. It presented no evidence that the City was aware of any PFM contracts to sell a car or an expectancy to do so. It presented no evidence of any intentional interference that caused a breach of the relationship or expectancy. It presented no evidence of an improper purpose or means by the City. Finally, it presented no evidence of damages.

In response to a summary judgment motion, the non-moving party cannot simply argue that there is "sufficient evidence in the record" to create an "issue of fact." The plaintiff needs to produce the evidence, cite to it specifically, and explain why it creates a genuine issue of material fact. PFM did not do so below and has not done so on appeal. Summary judgment should be affirmed on this claim.

F. PFM's claim for negligence is precluded by the public duty doctrine.

A claim for negligence consists of four elements: duty, breach, causation and damages. *American Commerce Ins. Co. V.*

Ensley, 153 Wn. App. 31, 42, 220 P.3d 215 (2009). The "existence of a duty is a question of law," not a question of fact. *Osborn v. Mason County*, 157 Wn.2d 18, 23, 134 P.3d 197 (2006). A government entity "is not liable for its negligent conduct even if a duty does exist unless the duty was owed to the injured person and not merely to the public in general." *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006), *citing Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). This is known as the public duty doctrine.

The public duty doctrine precludes government liability for allegedly negligent conduct by a government entity unless one of four recognized exceptions is proven: 1) legislative intent; 2) special relationship; 3) failure to enforce; and 4) rescue doctrine. *Munich v. Skagit Emergency Communication Center*, 175 Wn.2d 871, 879, 288 P.3d 328 (2012). PFM failed to identify any exception to the public duty doctrine applicable in this case.

PFM argued below that the City had a duty to notify it of the seizure under RCW 69.50.505 and breached this duty. PFM cited no authority that the alleged breach of this duty creates a cause of action for damages and does not address the issue in its appeal.

The City did notify the owner of the property, Sidney Potts. The City also notified Potts Family Motors, Inc., through its agent Sidney Potts. Thus, to the extent an enforceable duty was created by RCW 69.50.505(3), that duty was satisfied.

Finally, PFM did not establish that the City owed it a duty because it did not present any evidence that it actually owned the seized property.

G. The City is Immune for damages claims under RCW 69.50.506(c).

PFM's damage claims were precluded by RCW 69.50.506 (c) which provides "No liability is imposed by this chapter upon any authorized state, county, or municipal officer, engaged in the lawful performance of his or her duties." This immunity extends to the City. *Frost v. City of Walla Walla*, 106 Wn.2d 669, 673-74, 724 P.2d 1017 (1986).

Frost involved a replevin action against a City "for damages arising from seizure and improper impoundment of [plaintiff's] vehicle." *Id.* at 669. The City in that case admitted that the search that led to the seizure was improper and the car was eventually

returned to plaintiff. He sued for damages, as noted, and the Court held that the City was immune under RCW 69.50.506(c). As the Court noted, "[i]t is readily apparent that the purpose behind RCW 69.50.506(c) was to promote efficient and unhampered police action, free from the hindrance created if liability could be imposed on police for their good faith, objectively reasonable actions." *Frost,* 106 Wn.2d at 673. PFM did not dispute below that the City's officers were "engaged in the lawful performance of their duties" under RCW 69.50. The statutory language is clear. Thus, the City is immune from any damages claim and summary judgment can be affirmed on this basis as well.

PFM argues on appeal that *Frost* should be disregarded, but cites no case overturning its holding. Lower courts are "bound to follow supreme court precedent even if [they] may disagree with it." *State v. Watkins,* 136 Wn. 2d 240, 247, 148 P.3d 1112 (2006). PFM also failed to make this argument to the trial court and should not be permitted to make it for the first time on appeal. *Lewis v. City of Mercer Island,* 63 Wn. App. 29, 31, 817 P.2d 408 (1991); RAP 2.5(a).

PFM also argues that the immunity provision of RCW 69.50.506 (c) does not apply to a claim that notice of seizure was not

provided. However, the statute provides "No liability is imposed *by this chapter* upon any authorized state, county, or municipal officer, engaged in the lawful performance of his or her duties." The notice provision upon which PFM relies is RCW 69.50.505(3) – part of the same "chapter" as the immunity section. The argument that the immunity provision does not apply is contrary to the statute's language.

PFM again challenges the holding in *Frost* extending the immunity to the City, but cites no countervailing authority.

Finally, PFM argues, for the first time on appeal, that the City did not specifically identify RCW 69.50.506 (c) in its answer as an affirmative defense.

First, this Court should not consider this argument on appeal, as PFM did raise it in the trial court. *Lewis, supra,* 63 Wn . App. at 31. Second, the City did plead as affirmative defenses the compliance with the statutory procedures for forfeiting the property at issue and the reasonable exercise of governmental authority. CP 66. That was enough to put PFM on notice of the defense.

Third, the immunity defense was not waived because it was "tried by the express or implied consent of the parties." *Rainer Nat.*

Bank v. Lewis, 30 Wn. App. 419, 422, 635 P.2d 153 (1981).

"When issues that are not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings." *Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999) (internal citation omitted). "In determining whether the parties impliedly tried an issue, an appellate court will consider the record as a whole, including whether the issue was mentioned before the trial and in opening arguments, the evidence on the issue admitted at the trial, and the legal and factual support for the trial court's conclusions regarding the issue." *Id.* (internal citation omitted).

Here, the immunity defense was argued on the merits by both plaintiff and defendant in the briefs and orally in the summary judgment hearing, all without objection by PFM. *See,* CP 74-75 (opening summary judgment briefing on immunity argument by City); CP 125 (opposition briefing by PFM on immunity issue); CP 209 (reply briefing on immunity issue by City); VRP 13 and 55-56 (oral argument from both sides on immunity issue at summary judgment hearing). The issue was therefore tried with the implied consent of PFM and this constitutes a waiver of any objection.

Mahoney v. Tingley, 85 Wash.2d 95, 100–01, 529 P.2d 1068 (1975) ("objection to a failure to comply with the [affirmative defense pleading rule is waived where there is written and oral argument to the court without objection on the legal issues raised in connection with the defense."). *See also, Bickford v. City of Seattle*, 104 Wn. App. 809, 17 P.3d 1240 (2001).

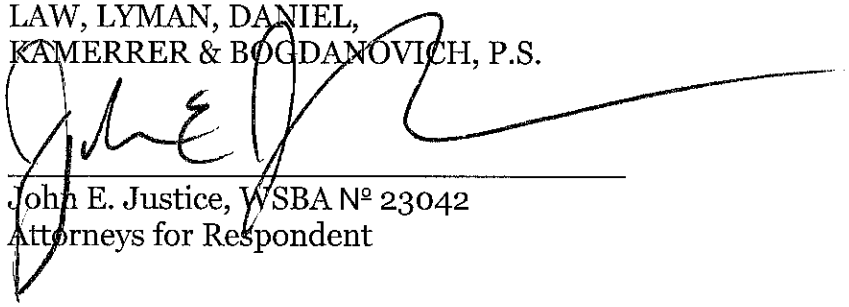
The rule requiring pleading of affirmative defenses is to "avoid surprise." *Id.* The immunity defense was not a surprise. It was asserted by summary judgment motion early in the life of the case, before a trial date was set, or discovery deadlines had passed. PFM could have sought a motion to continue the summary judgment hearing if it felt surprised by the defense. Instead, it opposed the immunity defense on the merits both in its briefing and at the summary judgment hearing. It never objected to the defense, or sought to continue the motion, based on an argument that immunity was not asserted in the answer. PFM's claim that the statutory immunity defense was not tried by its consent is not supported by the record. Summary judgment based on statutory immunity for any damage claims should therefore be affirmed.

VI. CONCLUSION

For the foregoing reasons, the trial court's grant of summary judgment in favor of the City of Longview should be affirmed on all claims.

RESPECTFULLY SUBMITTED this 29th day of April, 2019.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.



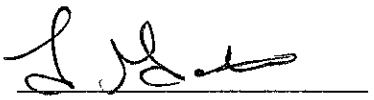
John E. Justice, WSBA № 23042
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify, under penalty of perjury, under the laws of the State of Washington and the United States that on this day I caused a copy of the foregoing BRIEF OF RESPONDENT to be mailed, postage prepaid, to Appellant's Attorney, addressed as follows:

Joshua Baldwin
Walstead Mertsching
PO Box 1549
Longview, WA 98632

Dated this 29th day of April, 2019 at Tumwater, WA.



Lisa Gates

1 Wash.App.2d 1057

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

CITY OF LONGVIEW POLICE DEPARTMENT, Respondent,
v.
Sidney A. POTTS, Appellant.

No. 48410–2–II
|
December 27, 2017

Appeal from Cowlitz Superior Court, 14–2–00217–4, Honorable Stephen M. Warning, Judge.

Attorneys and Law Firms

Sidney A. Potts, # 626771 M.C.C./WSR B–437–1, P.O. Box 777, Monroe, WA, 98272, for Appellant.

John A. Kesler III, Bean, Gentry, Wheeler & Peternell, PLLC, 910 Lakeridge Way SW, Olympia, WA, 98502–6068, for Respondent.

UNPUBLISHED OPINION

Lee, J.

*1 Sidney A. Potts appeals the superior court's order dismissing his appeal of an administrative action forfeiting Potts's property, cash, and bank accounts. Potts argues that (1) this court's ruling in his criminal case is dispositive, (2) the superior court erred in denying his motion to vacate, (3) the superior court erred in dismissing his appeal, and (4) the superior court erred in denying his motion to compel production of records. We reverse the superior court's order dismissing Potts's appeal of the administrative action forfeiting Potts's property, cash, and bank accounts, and remand for further proceedings consistent with this opinion.

FACTS

A. POTTS'S CRIMINAL CASE [1]

In July 2012, the City of Longview Police Department (the City) conducted several controlled buys with **Potts**. ***State v. Potts***, No. 45724–5–II, slip op. at 2–3 (Wash. Ct. App. July 6, 2016), http://www.courts.wa.gov/opinions/pdf/D24#5724-5IIÜnpublishedÖpinion.pdf. On August 10, the City applied for a search warrant for three properties connected to Potts: Potts Family Motors, Potts's second car dealership, and Potts's home. [2] *Potts*, No. 45724–5–II, slip op. at 5. However, the actual warrant only listed Potts Family Motors in the finding of probable cause. *Potts*, No. 45724–5–II, slip op. at 5. Despite this, the City searched all three properties, and under RCW 69.50.505, seized tools, vehicles, cash, and bank accounts. *Potts*, No. 45724–5–II, slip op. at 10; Clerk's Papers at 6–7, 10.

Potts was arrested and charged with one count of leading organized crime (count I), three counts of violating the Uniform Controlled Substances Act (UCSA) with delivery within 1,000 feet of a school bus route stop (count II, III, V), one count of violating the UCSA with possession within 1,000 feet of a school bus route stop (count VI), one count of violating the UCSA with delivery (count IV), and one count of money laundering (count VII). *Potts*, No. 45724–5–II, slip op. at 6. The State also filed aggravating factors, alleging that the current offense was a major violation of the UCSA for criminal profiteering. *Potts*, No. 45724–5–II, slip op. at 6. Subsequently, count VII was dismissed and the sentencing enhancements on counts V and VI were also dismissed. *Potts*, No. 45724–5–II, slip op. at 6.

While charges were pending, Potts moved for the return of his property. *Potts*, No. 45724–5–II, slip op. at 10 n.7. The trial court denied Potts's motion. *Potts*, No. 45724–5–II, slip op. at 10 n.7.

*2 In November 2013, Potts was convicted of all the remaining counts and aggravators. *Potts*, No. 45724–5–II, slip op. at 19. Potts appealed his convictions. *Potts*, No. 45724–5–II, slip op. at 19. Potts also challenged in a statement of additional grounds the trial court's denial of his motion for the return of property. *Potts*, No. 45724–5–II, slip op. at 50.

On July 6, 2016, we affirmed his convictions, but held that the search warrant only authorized a search for the

property connected with Potts Family Motors.[3] *Potts*, No. 45724–5–II, slip op. at 47. We also held that "because Potts will not be retried and because we conclude above that the search warrant for Potts's home [2839 Louisiana Street] was invalid, we conclude the property seized from Potts's home should be returned to its rightful owner(s)."[4] *Potts*, No. 45724–5–II, slip op. at 51.

B. POTTS'S CIVIL FORFEITURE CASE

On December 19, 2013, prior to this court's decision in Potts's direct appeal, a civil forfeiture hearing was held regarding property the City had seized from Potts.[5] The hearing officer concluded that the property was obtained in the commission of a felony relating to the sale or delivery of illegal controlled substances, and was subject to forfeiture under former RCW 69.50.505(a)(4).[6] On January 29, 2014, the hearing officer entered findings of fact and conclusions of law, and ordered the property forfeited to the City.[7]

On March 5, Potts filed a notice of appeal with the superior court, appealing the order of forfeiture, and mailed a copy to the City. Potts stated that he was notified of the forfeiture of his property, attached the hearing officer's order, and requested the superior court set a schedule for pursuing the appeal.

On July 1, the City filed a motion to dismiss Potts's appeal, arguing that the City was not properly served with the notice of appeal. On July 10, Potts filed a judicial notice of fact, which included additional facts and argument against forfeiture, and requested that his property be held until a final decision on appeal. On July 30, the superior court subsequently granted the City's motion and dismissed Potts's appeal of the forfeiture order.

On August 6, Potts appealed the superior court's dismissal of his appeal to this court. On appeal, the City withdrew its argument that it was not timely served with the notice of appeal. *City of Longview Police Dep't v. Potts*, No. 46574–4–II, slip op. at 1 (Wash. Ct. App. July 14, 2015), http://www.courts.wa.gov/opinions/pdf/D24#6574-4-IIÜnpublishedÖpinion.pdf. Rather, the City argued for the first time on appeal that the appeal was properly dismissed because Potts failed to comply with the requirements of RCW 34.05.546. *Potts*, No. 46574–4–II, slip op. at 2.

*3 We treated the City's withdrawal of its untimely service argument as a concession that the superior court erred in dismissing Potts's appeal, held that the superior court improperly dismissed Potts's appeal, and remanded the case to the superior court. *Potts*, No. 46574–4–II, slip op. at 2, 3–4. We did not address the City's argument on RCW 34.05.546 raised for the first time on appeal, but expressly stated that "[o]n remand, the City is free to argue that Potts's notice of appeal did not comply with RCW 34.05.546." *Potts*, No. 46574–4–II, slip op. at 4.

On August 10, 2015, Potts filed a supplemental notice of appeal in the superior court. The supplemental notice included additional facts and argument against forfeiture, such as the lack of probable cause for the seizure of property, and requested that such property be returned. The City responded by filing a motion to dismiss the appeal, arguing that Potts failed to comply with RCW 34.05.546.

On October 14, the superior court held a hearing on the City's motion and granted the City's motion to dismiss Potts's appeal pursuant to RCW 34.05.546. On November 9, Potts appealed the superior court's order of dismissal pursuant to RCW 34.05.546. We accepted review on April 7, 2016. .

After we accepted review, Potts filed a motion in the superior court to compel the City to produce the agency record for his appeal pursuant to RCW 34.05.566(1). The superior court held a hearing on Potts's motion to compel and denied the motion.

Also after we accepted review, Potts filed a motion in the superior court to vacate the order dismissing his appeal. The superior court denied Potts's motion.

ANALYSIS

A. DISMISSAL OF APPEAL

Potts argues that the superior court erred when it dismissed his appeal pursuant to RCW 34.05.546. Specifically, Potts argues that the superior court had jurisdiction over his appeal,[8] his notice of appeal complied with RCW 34.05.546, his notice of appeal substantially complied with RCW 34.05.546, he remedied

any noncompliance, and the dismissal was not the proper remedy for any noncompliance.[9]

1. Compliance with RCW 34.05.546

Under RCW 34.05.546, the petition for review must include:

(1) The name and mailing address of the petitioner;

(2) The name and mailing address of the petitioner's attorney, if any;

(3) The name and mailing address of the agency whose action is at issue;

(4) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;

***4** (5) Identification of persons who were parties in any adjudicative proceedings that led to the agency action;

(6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;

(7) The petitioner's reasons for believing that relief should be granted; and

(8) A request for relief, specifying the type and extent of relief requested.

In his petition for review, Potts only noted when he was informed of the forfeiture of certain property, acknowledged the 30–day deadline for filing a notice of appeal, requested the superior court set a schedule for the appeal, and attached the hearing officer's forfeiture order. Potts did not include his mailing address, the "name and mailing address of the agency whose action [was] at issue," "[i]dentification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action," "[i]dentification of persons who were parties in any adjudicative proceedings that led to the agency action," "[f]acts to demonstrate that the petitioner [was] entitled to obtain judicial review," "reasons for believing that relief should be granted," nor "[a] request for relief, specifying the type and extent of relief requested." RCW 34.05.546.

While Potts argues that he complied with RCW 34.05.546 by attaching the forfeiture order, this argument is not persuasive. Such attachment has only been held as substantial compliance when the content of the attachment meets the requirements of RCW 34.05.546. *See Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 557, 958 P.2d 962 (1998).

Potts did not comply with the requirements of RCW 34.05.546 by attaching the forfeiture order. Unlike *Skagit Surveyors* where the missing required information was included in the forfeiture order, the missing and required information here was not stated in the hearing officer's forfeiture order. Neither Potts's petition nor the forfeiture order included Potts's mailing address, facts to demonstrate that he was entitled to obtain judicial review, reasons for believing that relief should be granted, nor a request for relief, specifying the type and extent of relief requested. Therefore, Potts did not comply with RCW 34.05.546.

2. Substantial Compliance with RCW 34.05.546

Alternatively, Potts argues that he substantially complied with RCW 34.05.546 by attaching the forfeiture order to his notice of appeal. Again, we disagree.

"[A]n essential aspect of substantial compliance is some level of *actual* compliance with the substance essential to the statute, although a procedural fault rendered the compliance imperfect." *Clymer v. Emp't Sec. Dep't*, 82 Wn. App. 25, 28–29, 917 P.2d 1091 (1996). But "a failure to comply (through inaction, inadvertence, or in a manner which does not fulfill the objective of the statute), or belated compliance, cannot constitute substantial compliance with the requirements relating to the filing of a petition for judicial review." *Id.* at 29.

Here, Potts argues that he substantially complied with RCW 34.05.546 by attaching the forfeiture order to his notice of appeal. But attaching the forfeiture order did not constitute substantial compliance. While the forfeiture order included his business mailing address, the name of the agency whose action was at issue, identified the agency action at issue, and identified persons who were parties in proceedings that led to the action at issue, the forfeiture order did not include all the requirements that were missing in his notice of appeal. Specifically, the forfeiture order did not include "[f]acts to demonstrate that the petitioner [was] entitled to obtain judicial review," "reasons for believing that relief should be granted," or "[a] request for relief, specifying the type and extent of

relief requested." RCW 34.05.546. Because there was no level of compliance with these requirements, Potts failed to substantially comply with RCW 34.05.546.

3. Noncompliance Cured

*5 Potts argues that his judicial notice of fact and supplemental notice of appeal cured any noncompliance with RCW 34.05.546. We agree.

A petition for review must be timely filed and contain the statutorily required information. *See* RCW 34.05.542 and .546. But when procedural defects exist in a timely filed petition, courts should provide a reasonable time to cure once the defect is brought to the attention of the petitioner. *See e.g., Biomed Comm, Inc. v. Dep't of Health Bd. of Pharmacy*, 146 Wn. App. 929, 938, 193 P.3d 1093 (2008).

Here, Potts's petition seeking review of the forfeiture order by the superior court was timely filed on March 5, 2014, but the petition did not contain the information required under RCW 34.05.546. Potts endeavored to cure any noncompliance with RCW 34.05.546 by filing his judicial notice of fact on July 10, 2014. Potts's judicial notice of fact, combined with his original petition and attached forfeiture order, contained all of the information required under RCW 34.05.546.

Potts first appealed the superior court's order dismissing his appeal of the forfeiture order on August 6, 2014. The City argued for the first time in that appeal that Potts failed to meet the requirements of RCW 34.05.546. We reversed the superior court's dismissal of Potts's petition and held that the City was free to argue that Potts failed to meet the requirements of RCW 34.05.546 on remand.

After we filed our decision, Potts filed a supplemental notice of appeal. The supplemental notice contained additional facts to demonstrate that the seizure of property from Potts's home and second dealership was done without probable cause, additional reasons for believing relief should be granted (that the seizure was unlawful), and another request for return of the unlawfully seized property. These additional facts, reasons, and requests for relief further cured Potts's initial noncompliance with RCW 34.05.546. Under these circumstances, we hold that Potts cured any noncompliance with RCW 34.05.546.

B. EFFECT OF CRIMINAL PROCEEDING

Potts argues that this court's holding in his criminal case controls the outcome of the civil forfeiture action. We agree.

1. Collateral Estoppel

Criminal proceedings and civil forfeiture proceedings, while parallel, are separate. *See* RCW 69.50.505; *Deeter v. Smith*, 106 Wn.2d 376, 378, 721 P.2d 519 (1986). But courts have found that a criminal ruling, including rulings on the legality of a seizure, controls in a parallel civil forfeiture proceeding when collateral estoppel applies. *See Barlindal v. City of Bonney Lake*, 84 Wn. App. 135, 145, 925 P.2d 1289 (1996); *see also City of Walla Walla v. $401,333.44*, 150 Wn. App. 360, 365–66, 208 P.3d 574 (2009).

Collateral estoppel requires a showing of: (1) identical issues, (2) a final judgment on the merits, (3) the party against whom the issue is asserted must have been a party to or in privity with a party to the prior adjudication, and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *$401,333.44*, 150 Wn. App. at 365. "Privity denotes a mutual or successive relationship to the same right or property." *Barlindal*, 84 Wn. App. at 143.

*6 Here, collateral estoppel applies. First, the issues are identical—whether there was a search pursuant to a valid warrant. Second, there is a final judgment on the legality of the search issue on the merits—the **State** Supreme Court denied **Potts's** petition for review in the criminal case and a mandate has been issued. Third, privity exists between the City and the State. The City and the State both operated under the same state law, relied upon the same search warrant and subsequent search, and both would benefit from an order of forfeiture as 10 percent of the proceeds of any property forfeited must be remitted to the state treasurer and deposited into the state general fund. *See* RCW 69.50.505(9)(a). The City and the State "had a mutual interest and shared a common purpose in a successful prosecution ... as well as a successful forfeiture of [the owner's] possessions."[10] *Barlindal*, 84 Wn. App. at 143. Fourth, injustice would not result against the City because its officers conducted the initial investigation and created the affidavit of probable cause, the affidavit was then used to support the warrant used in this case to conduct the search and seizure, and that affidavit and

warrant was reviewed at trial and on appeal. Therefore, collateral estoppel applies. [11]

2. Void Forfeiture Order

Applying our prior holding in the criminal appeal, we hold the forfeiture order was void as it related to the property seized from Potts's home and his second dealership.

a. Legal principles

Under RCW 69.50.505(1)(b), any equipment used, or intended to be used, to produce or deliver any controlled substance under the chapter, is subject to forfeiture. Any vehicles used, or intended to be used, to facilitate the sale, delivery, or receipt of any controlled substance under the chapter are also subject to forfeiture. RCW 69.50.505(1)(d). And any monies furnished or intended to be furnished in exchange for a controlled substance in violation of the chapter are also subject to forfeiture. RCW 69.50.505(g).

Property subject to forfeiture may be seized by any law enforcement officer without process if the seizure is incident to a search warrant. RCW 69.50.505(2)(a). The authority to order forfeiture is statutory and must comply with proper forfeiture procedure. *City of Walla Walla v. $401,333.44*, 164 Wn. App. 236, 246, 262 P.3d 1239 (2011).

We review final agency orders under the APA, "stand[ing] in the shoes of the superior court." *Musselman v. Dep't of Soc. & Health Servs.*, 132 Wn. App. 841, 846, 134 P.3d 248 (2006). When a trial court lacks the authority to enter an order, the order is void. *Servatron, Inc. v. Intelligent Wireless Prods., Inc.*, 186 Wn. App. 666, 679–80, 346 P.3d 831 (2015). We review de novo whether a judgment is void. *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 195, 312 P.3d 976 (2013), *review denied*, 179 Wn.2d 1010 (2014).

b. Property illegally seized from Potts's home and second dealership

Here, we held in Potts's criminal appeal that the search warrant used by the City to search Potts's home and his second dealership, and seize property from those properties, was invalid. *See Potts*, slip. op. at 47–48, 51. Therefore, the seizure of property from those two properties was unlawful.

Potts argues that this seizure pursuant to an invalid warrant for lack of probable cause rendered the hearing officer without jurisdiction. But the lack of probable cause for a seizure goes to the merits of a forfeiture claim, and not to a court's jurisdiction to hear the claim. *$401,333.44*, 164 Wn. App. at 251.

*7 Here, because the City unlawfully seized the property from Potts's home and the second dealership, the hearing officer could not find that the property was seized pursuant to RCW 69.50.505, which allows officers to seize property without process if done so under a search warrant. Without such a finding, the hearing officer could not order the property forfeited. Therefore, we hold that the forfeiture order relating to the property seized from Potts's home and his second dealership was void and vacate those portions of the order. [12]

C. MOTION TO VACATE

Potts argues that the superior court erred when it denied his motion to vacate the dismissal of his appeal. We do not address this claim.

Under RAP 5.3(a), a notice of appeal must "designate the decision or part of decision which the party wants reviewed." We will review a trial court decision not designated in the notice of appeal, "if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review." RAP 2.4(b). If a party wants to seek review of a trial court decision entered "after review in the same case has been accepted by the appellate court, the party must initiate a separate review of the decision by timely filing a notice of appeal." RAP 5.1(f).

Here, Potts did not designate the superior court's denial of his motion to vacate in his notice of appeal. And Potts did not initiate a separate review of the denial by filing another notice of appeal. Furthermore, the superior court's denial of Potts's motion to vacate the order does not prejudicially affect the order of dismissal pursuant to RCW 34.05.546, which is the decision on appeal. The superior court's denial of Potts's motion to vacate is not before this court on appeal, and we do not address it further. [13]

D. MOTION TO COMPEL

Potts argues that the superior court erred when it denied his motion to compel agency records. The record on appeal does not contain Potts's motion, but contains only objections and responses thereto. The record is insufficient for us to address this claim. *Wash. Pub. Tr. Advocates v. City of Spokane*, 120 Wn. App. 892, 898, 86 P.3d 835 (2004).

We reverse the superior court's order dismissing Potts's appeal of the administrative action forfeiting Potts's property, cash, and bank accounts and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Worswick, P.J.

Sutton, J.

All Citations

Not Reported in P.3d, 1 Wash.App.2d 1057, 2017 WL 6603660

Footnotes

1 The facts pertaining to Potts's criminal case are taken from our decision in his criminal appeal, which was included in the supplemental clerk's papers for this case. ***State** v. **Potts***, No. 45724–5–II, slip op. at 2 (Wash. Ct. App. July 6, 2016), http://www.courts.wa.gov/opinions/pdf/D24#5724-5-IIÜnpublishedÖpinion.pdf.

2 In the City's response to Potts's motion to vacate, it noted that the search warrants were for three addresses in Longview, Washington: 411 Oregon Way (Potts Family Motors); 1275 Alabama Street (Potts's second dealership); and 2839 Louisiana Street (Potts's home).

3 On appeal, the State conceded that the warrant did not authorize seizure of tools. *Potts*, No. 45724–5–II, slip op. at 47 n.25.

4 The opinion is silent as to whether the property from Potts's second dealership located at 1275 Alabama Street was to be returned to the rightful owner.

5 The seized property at issue in the forfeiture hearing included 29 vehicles, 19 tools and pieces of equipment, and almost $56,000 in cash and bank accounts.

6 RCW 69.50.505 was amended in 2003. No substantive changes were made; rather, the paragraphs within this statute were renumbered. LAWS OF 2003, ch. 53, § 348. The provision cited to by the hearing officer is now RCW 69.50.505(1)(d).

7 The order was served on Potts on February 18, 2014.

8 Potts argues that the superior court had jurisdiction to review his appeal, and because the City does not dispute this, we do not address the issue.

9 Potts also argues in his reply that the superior court violated his due process rights when it granted the State's motion to dismiss his appeal pursuant to RCW 34.05.546. Although this alleged violation was noted in Potts's notice of appeal, he failed to provide argument in his opening brief as required by RAP 10.3, and does so for the first time in his reply. We will not consider due process arguments raised for the first time in a reply brief. *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 630, 285 P.3d 187 (2012), *review denied*, 176 Wn.2d 1021 (2013). Potts also fails to provide any relevant legal argument or support for his argument. He only cites to the civil rules and judicial rules of conduct but does not explain how his due process rights were violated by a violation of these rules. Therefore, we decline to address this claim. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

10 Furthermore, "the inability of a [City] attorney to control the prosecution does not diminish the common interests that both agencies have in the outcome of the prosecution." *Barlindal*, 84 Wn. App. at 144.

11 Potts also argues that (1) the search warrant did not authorize seizure of certain property from Potts Family Motors, and thus, that property could not be forfeited; and (2) the Department failed to follow RCW 69.50.505's notice requirements. Our record on appeal contains neither the search warrant nor evidence of any notice or lack thereof. Therefore, we decline to address this issue. *Wash. Pub. Tr. Advocates v. City of Spokane*, 120 Wn. App. 892, 898, 86 P.3d 835 (2004) ("If the record is insufficient for review, we may decline review of a particular issue.").

12 We note that it would be the height of irony in this case if the State were allowed to keep unconstitutionally seized property because Potts did not provide a mailing address under RCW 34.05.546.

13 Potts also argues that we should vacate the hearing officer's forfeiture order and the superior court's dismissal order because: the hearing officer did not have personal jurisdiction over the property seized from Potts Family Motors due to the City's failure to provide the required notice to Potts Family Motors, notice was served on the hearing officer that the property belonged to Potts Family Motors, and no hearing was held to determine the ownership of the property seized. However, the record is insufficient for us to address this issue. *Wash. Pub. Tr. Advocates*, 120 Wn. App. at 898. The notice allegedly provided does not exist in the record. Therefore, we decline to address this claim.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

April 29, 2019 - 10:08 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52751-1
Appellate Court Case Title:	Potts Family Motors, Inc., Appellant v. City of Longview, Respondent
Superior Court Case Number:	17-2-00450-3

The following documents have been uploaded:

- 527511_Briefs_20190429100749D2798381_7330.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- jbaldwin@walstead.com

Comments:

Sender Name: Lisa Gates - Email: lisa@lldkb.com
Filing on Behalf of: John Edward Justice - Email: jjustice@lldkb.com (Alternate Email: lisa@lldkb.com)

Address:
P.O. Box 11880
OLYMPIA, WA, 98508
Phone: (360) 754-3480

Note: The Filing Id is 20190429100749D2798381